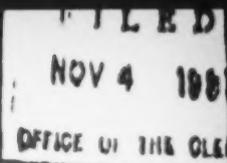


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91-770



Case No. _____

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

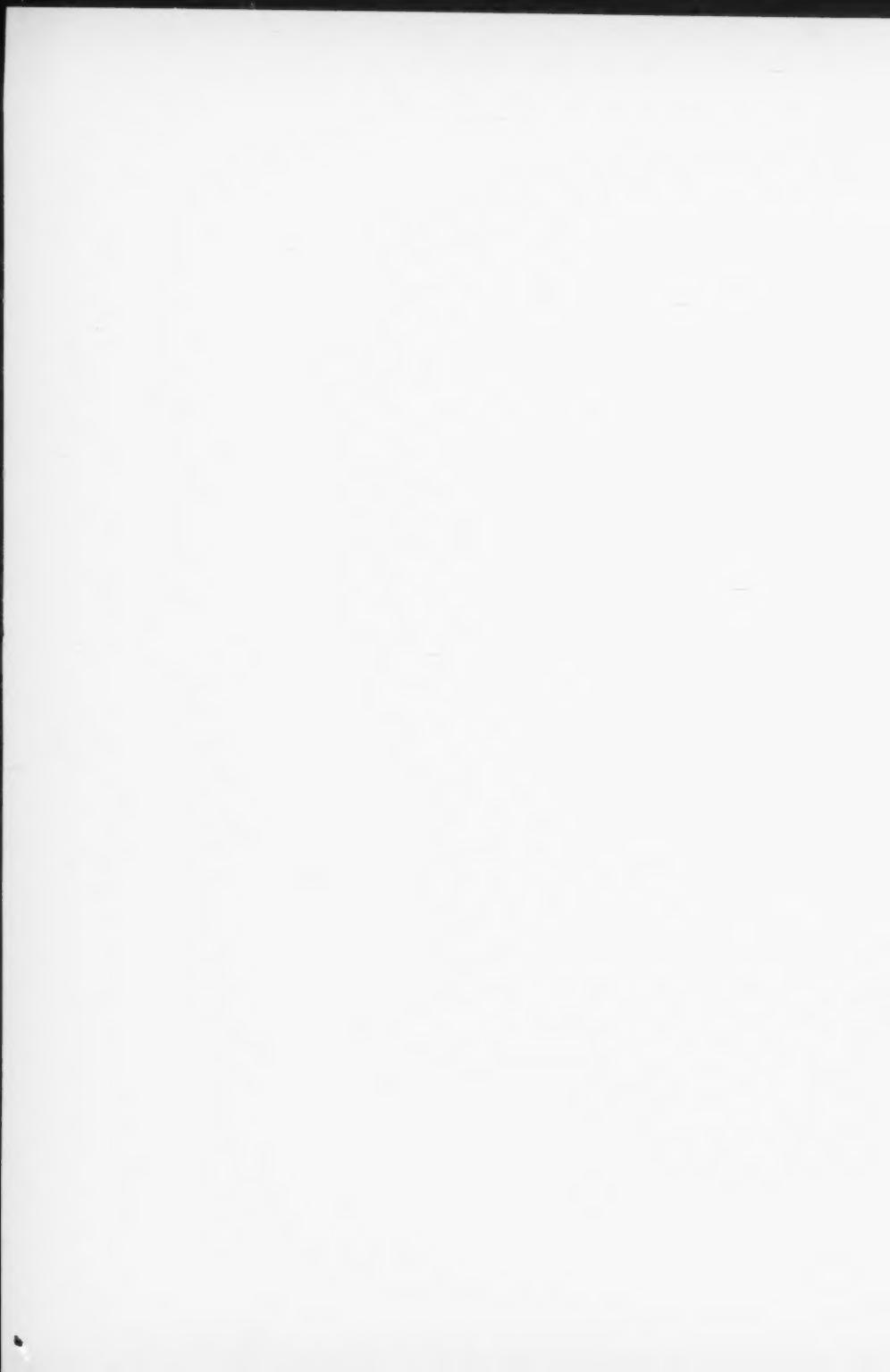
DONALD B. RICE, SECRETARY OF
THE AIR FORCE,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

APPENDIX
VOLUME II

LAURENCE J. ZIELKE
PEDLEY ROSS ZIELKE GORDINIER
1150 Starks Building
Louisville, Kentucky 40202
502-589-4600



78. On 24 June 1985, the windows and roofing material for the Palm Circle units arrived on the site (tr. 12/26-27).

79. On 24 June 1985, the parties met to discuss scheduling of work. The government stated that work could not begin in area I because the government intended to put the occupants in temporary housing during construction but the temporary housing would not be available until 1 October. A new work sequence was worked out, starting with Area II, then proceeding to Area III and finishing with area I. SKI was directed to perform the outside work on any given unit in which the occupant was not at home and come back to finish the inside work later. SKI represented it was prepared to begin work anywhere the government would allow. SKI repeated

that the prior actions of the government would be the subject of a claim by SKI (R4, tab 60;SR4, tab 88).

80. On 27 June 1985, SKI returned proposed modification P00005 to the government, unsigned. The modification proposed a new sequence of work, a 120 day time extension and a release by SKI (exh. A-63).

81. On 28 June 1985, the TCO returned the contract to the TCO without terminating the contract since SKI now had the material on hand and ready for use to perform on Palm Circle (exh. A-62).

81. On 28 June 1985, the parties met to discuss the start of contract work. It was agreed that work would commence on 1 July at 102 Palm Circle. SKI was given permission to perform the outside work and return for the inside

work in instances when occupants were not at home (SR4, tab 45).

83. Work commenced as agreed on 1 July 1985 at 102 Palm Circle and SKI beginning work on the plywood enclosure of the carport (R4, tab 64, SR4, tab 96 report 2).

84. On 9 July 1985, the government paid SKI's 5 April and 9 May invoices for \$158,163.49 and \$45,421.39, respectively, (total of \$203,584.88 (R4, tab 62).

85. On 11 July 1985, SKI requested that it be allowed to start work on another unit the next day despite the fact that it did not have the roofing material on hand to complete the job, contending that the requirement for all material to be on hand and ready of ruse was waived at the 28 June meeting. The government agreed to allow SKI to start if the materials were on hand or readily

available locally in lieu of on hand and ready for us (SR4, tab 46).

86. On 15 July 1985, a government inspector discovered a roofing company, other than the roofing subcontractor identified by SKI to the government, working on the contract. When questioned, Mr. McDonald stated that he did not know why this happened (SR4, tab 96 report 14).

87. On 16 July 1985, the government sent another proposed modification P00005 to SKI for signature. The modification formalized the schedule of work: starting in area II at Palm Circle, proceeding to area III and ending with area I. The modification also contained a release clause (R4, tab 63).

88. On 18 July 1985, SKI was informed that its roofing subcontractor's

insurance certificate was not adequate (SR4, tab 47).

89. On 19 July the parties met again and Mr. McDonald alleged that during the 28 June meeting, the government had waived the 15 day completion requirement. The contracting officer denied this. SKI was reminded that the government was not responsible for quality control and that it would inspect only when a unit was completed. The government inquired when SKI would have a unit completed and Mr. McDonald replied that the range hoods had to be sent back to the manufacturer and that a unit would be ready in 14 days (SR4, tab 47).

90. On 22 July 1985, SKI informed the government that it had changed roofing subcontractors.⁷ (SR4, tab 96 report 21).

91. Also on 22 July, the government notified SKI that since SKI started work on 102 Palm on 1 July, and more than 15 calendar days has passed, it was delinquent (R4, tab 64).

92. On 30 July 1985, the government's construction manager (St. Stipo), project engineer, and inspector visited the 4 units on Palm Circle and 38 units on Oak Drive that SKI was working on. Work had started more than 15 days ago on 15 of these units. Some of the units had very little work accomplished and none had their new patio slabs poured. The government discovered that SKI was again beginning work on units without having all of the materials available to complete the job. In particular, after starting work on 28 units, SKI discovered that the shower

doors it had were the wrong size and could not be used (SR4, tab 51).

93. On 1 August 1985, a meeting was held at SKI's request to discuss the possibility of phasing the construction. It was SKI's position that when the government changed the sequence of houses, it waived the 15-day completion requirement. The contracting office denied that the requirement had been waived. Mr. Skip Kirchdorfer suggested that the roofers be allowed to proceed ahead of all work. The patios would then be completed and then the inside work would be performed (SR4, tab 49).

94. The government had an internal meeting on 2 August 1985 to discuss SKI's requests. SKI now had 48 units under renovation, many of which the government considered overdue. The contracting officer determined that SKI would not be

issued any more units to start work on until it began completing units (SR5, tab 50).

95. Also on 2 August 1985, the contracting officer issued SKI a cure notice for the units that the government considered overdue. The government determined the following information:

ADDRESS	DATE BEGUN	SCHEDULED COMPLETION DATE
102 Palm	1 July	16 July
104	3 July	18 July
108	9 July	23 July
110A Oak	11 July	29 July
110B	11 July	25 July
110C	11 July	25 July
110D	11 July	25 July
112A	11 July	25 July
112B	11 July	25 July
112C	11 July	25 July
112D	11 July	25 July
114A	12 July	27 July
114B	12 July	27 July
114C	12 July	27 July
114D	12 July	27 July
116A	15 July	29 July
116B	15 July	29 July
116C	15 July	29 July
116D	15 July	29 July

The government conceded that SKI had been delayed in getting into 110A Oak for

4 days. It is SKI's position that the cure notice was impossible to comply with because the 15-day period had already passed and no new completion date had been set (app. br. at 58-59). Mr. Skip Kirchdorfer testified that it was SKI's plan for July to roof all 46 units, come back and do the interior work and remaining exterior work, including windows and doors and fascia and then install patios. It was also Mr. Skip Kirchdorfer's intent not to ask for an acceptance inspection for any of the units on the contract until SKI had completed all work under the contract. He interpreted the 15-day completion requirement to mean substantial completion only (tr 1/46, 2/210, 3/26-27; R4, tab 66).

96. On 5 August 1985, SKI returned proposed modification P00005 (of 16 July

1985) to the government unsigned, objecting to the entire modification, including the sequence agreed to at the 24 June 1985 meeting (R4, tab 67).

97. On 5 August 1985, SKI informed the government that it could not supply a completion date for the Palm Circle units because of fences in the rear of the units not having been removed for patio work. SKI also replied to the cure notice. SKI stated that it was delayed by fences not having been removed or occupants not being at home at 104 Palm Circle, 106 Palm, 110A Oak, 110B Oak, 110C Oak, 110D Oak, 112A Oak, 112B Oak, 112C Oak, 112D Oak, 114A Oak, 114B Oak, 114D Oak, 116B Oak, 116C Oak, 116D Oak, 118 Oak, 120 Oak and 122 Oak.⁸ SKI finished with "[i]t is unfortunate that the government cannot abide by its agreements and must resort to deceit and

entrapment to satisfy its need for personal revenge" (R4, tabs 68, 70).

98. On 7 August 1985, the government sent SKI a delinquent performance letter because 48 units were in its possession but none were completed (R4, tab 72).

99. On 8 August 1985, SKI informed the government that it could not submit a realistic progress chart because of the continuing government delays (R4, tab 73).

100. On 9 August 1985, Mr. McDonald complained to the government inspector that the occupants were slow in getting their possessions out of the work areas and asked who was responsible for notifying the residents that work was going to start. The inspector reminded Mr. McDonald that SKI had requested that it be allowed to notify the residents to

allow SKI to schedule its workforce better. On a number of occasions, SKI would make an appointment with a housing resident to perform work and not show up for the appointment. SKI would also show up to perform work without notifying the resident (SR4, tab 96, report 25, SR4, tab 97 reports 6, 15, 30-31, SR4, tab 98 reports 2, 26).

101. On 12 August 1985, Mr. Skip Kirchdorfer contacted the government, alleging that the government's 7 August deficiency letter was a stop work order. The government responded that it was not a stop work order but that no more new units would be given to SKI until it started to complete units it was working on. Mr. Skip Kirchdorfer stated that SKI considered it a stop work order and would leave the job site. The government stated that it would consider that to be

an abandonment of the contract (SR4, tab 52).

102. Also on 12 August, Mr. McDonald requested a final inspection for some of the units on Palm Circle and Oak Drive. The contracting officer instructed the inspectors to perform a final inspection only if the units were ready to be inspected (SR4, tab 53).

103. Accordingly, on 12 August, the government performed a pre-final inspection on 102 Palm. Almost 60 punchlist items were found, discussed with SKI and reported in writing to SKI. The government expressed concern over the large number of deficiencies and questioned whether SKI had an effective quality control program. SKI agreed to put into writing any disagreements it had with any of the punchlist items found

(SR4, tabs 54, 56, 97; R4, tab 74; tr. 11/93-102).

104. Still on 12 August, Mr. McDonald also requested final inspections for 104 and 108 Palm and 112A-D Oak for 13 August. The inspectors observed that the same deficiencies were present in these units so SKI's request for an inspection was denied. (tr. 11/106-07).

105. On 13 August 1985, the government assured SKI that the residents would take down their fences as work on their units was scheduled (SR4, tab 96 report 31).

106. On 13 August 1985, SKI requested a second pre-final inspection on 104 and 108 Palm and 112A-D Oak to occur on 14 August. The inspectors performed a preliminary review of the units and most of the deficiencies remained from the prior day and therefore

the request for an inspection was denied.

The inspectors again reminded Mr. McDonald that quality control was SKI's responsibility (SR4, tab 97 report 9).

107. On 14 August 1985, the inspectors performed another pre-final inspection on 104 and 108 Palm and 112A-D Oak. The same deficiencies were discovered and again SKI was reminded that the government was not going to perform SKI's quality control for it and a copy of the punchlist was hand delivered to SKI. Mr. McDonald complained that he was spread too thin and did not have the capability of performing quality control (SR4, tab 97 report 10; tr. 13/185, 200-02).

108. On 21 August 1985, at SKI's request, a reinspection of 102 Palm was performed. Twenty-eight discrepancies remained from the prior inspection and 4

additional ones were discovered. During the inspection, Mr. McDonald was told about the defects that were found (SR4, tab 97 report 17, SR4, tab 120; tr. 6/169-72).

109. On 22 August 1984, at SKI's request, a pre-final inspection was performed at 104 Palm Circle. A large number of deficiencies, some major, some minor, were discovered. Many duplicated defects found in 102 Palm Circle. Mr. McDonald stated that corrections would not be made because SKI's workmanship was at the highest level that it could attain (SR4, tab 97 report 18, SR4, tabs 59, 60; tr. 6/193-99, 8/326, 11/115-16).

110. On 23 August 1985, SKI invoiced the Government for \$169677.11 based on its estimated 9% contract completion (R4, tab 80).

111. On 23 August 1985, at SKI's request, a pre-final inspection was performed at 110A-D Oak. Many of the same deficiencies were found and Mr. McDonald repeated that SKI did not intend to correct the alleged defects. SKI was directed to address in writing those defects that it was refusing to correct (SR4, tab 97 report 19, SR4, tab 122; tr. 11/207-09, 13/215-16; R4, tab 78).

112. On 4 September 1985, a pre-final inspection of 114D Oak was conducted. After finding a large number of deficiencies and determining that the unit was not ready for an inspection, SKI was advised that it must perform quality control inspections before requesting that the government inspect further. Mr. McDonald repeated that SKI did not intend to correct some of the deficiencies since SKI disagreed that they were deficiencies

(SR4, tab 97 reports 30-31; tr. 11/209-10, 13/83-84).

113. On 9 September 1985, another pre-final inspection was performed on 110A-D Oak. Numerous deficiencies were found and Mr. McDonald repeated that the defects would continue because SKI's workmanship could not get any better (SR4, tabs 61, 98 report 5; tr. 6/226-30, 11/142, 149; R4, tab 82).

114. On 10 September 1985, the government cancelled a planned inspection of 112 and 114 Oak due to obvious defects rendering the units not ready for inspection (SR4, tab 98 report 6).

115. Also on 10 September, the government refused to pay SKI's 23 August invoice until SKI completed the 48 units in its possession (R4, tab 80).

116. On 11 September 1985, Mr. McDonald asked the government for

inspections of 112A-D, 114A-D, 116A-D, 118A-d, 120A-D, 122A0D, 124A0D, 105A-D, 107A-D, 109A-D and 126B Oak. The inspectors refused to inspect because some of the buildings were not even 50% complete and an inspection would be futile (SR4, tab 98 report 8).

117. On 12 September 1985, government contract representatives went to the site to investigate. The first unit view was 105 Oak. None of the exterior work had been done at all. 109 Oak had no windows and the exterior painting was not done. Other units had interior painting undone, roofs not on, kitchen counters and patios missing (SR4, tab 62).

118. On 13 September 1985, SKI wrote the government stating:

We have every intention of completing the units in our

possession in accordance with the contract.

Your refusal to pay until the units are accepted by the inspectors and the inspectors refusal to inspect the units is a breach of our contract and is placing a severe financial strain on our company.

We are currently demobilizing due to your stop work order and remobilization cost will compound the financial strain on our company.

(R4, tab 81).

119. On 17-18 September, 1985, pre-final inspections were conducted at 112A-D and 114A-D Oak. Numerous defects were again found (SR4, tab 98 reports 13-14; tr 11/143-44; R4, tab 92).

120. On 17 September 1984, the contracting officer issued a cure notice to SKI giving SKI 10 days to inform the government what steps it was taking to ensure that adequate quality control and correction of defects were accomplished and what efforts to diligently prosecute

the work in a timely manner SKI was making. The contracting officer also sent SKI a show cause notice that same day because the contracting officer deemed SKI's 6 August 1985 response to the contracting officer's 2 August 1985 cure notice to be inadequate (R4, tabs 84, 90).

121. On 18 September, the government project manager informed SKI's project manager that until SKI took care of the deficiencies in (a) patio expansion joints (b) shade cords, (c) soffit plywood joints, (d) screws in door lites, (e) [unintelligible writing], and (f) roof edge metal, that the inspectors would not inspect any more units (exh. A-107, note dated 18 September 1985).

122. Subsequent to 18 September 1985, SKI did not request any more

inspections from the government (tr. 11/153-54, 14/281-82, 285).

123. The record reveals that subsequent to 18 September 1985, virtually no work at all was performed on the contract and SKI had in fact demobilized. The few SKI employees left spent some of their time playing cards and golf. When on sporadic occasions the government inspectors would encounter SKI personnel on the job site apparently doing some touch-up work, the employees would immediately leave, telling the inspectors that they were only "looking around" (SR4, tab 98 reports 18 et seq., SR4, tab 99 report 2, 30-31, SR4, tabs 100-01; tr. 10/165, 169-70, 11/218-19, 13/90-91, 234-35).

124. On 19 September 1985, Mr. McDonald informed the government that SKI was going to remove its warehouse and

wanted the government to direct him as to what to do with the materials (SR4, tab 98 report 15).

125. On 19 September 1985, SKI wrote the government four letters. The first was in response to the government 10 September letter which refused to pay SKI's latest invoice. SKI stated:

We have searched our contract and cannot locate the provision which will allow you to return our invoices without payment. I suspect that this is another attempt to penalize Skip Kirchdorfer, inc., because your previous termination for default failed.

Would you please send me a copy of the "Demonstrate Your Intention" Clause of our contract on which you undoubtedly based your decision.

(R4, tab 85).

126. SKI's second 19 September 19855, retransmitted its 12 August invoice (R4, tab 86).

127. SKI's third 19 September letter was a response to the government's cure

notice. SKI stated that its quality control was adequate. SKI alleged that progress was slow due to government delays and that SKI was willing to correct all legitimate defects (R4, tab 88).

128. SKI's further 19 September letter responded to the government's show cause notice. SKI stated that all work on the units listed in the government 2 August letter had been completed, as had all punchlist items for 110, 112 and 114 Oak. SKI alleged that it had not been able to correct the defects on Palm Circle because it had not been allowed to re-enter the units (R4, tab 89).

129. As of 20 September 1985, SKI had laid off all of its workforce except four supervisors (SR4, tab 71, 98 report 16; tr. 11/123-24, 151, 12-231-32, 14-251).

130. On 24 September 1985, the parties met. SKI insisted on being paid regardless of whether the work performed was acceptable and the government contended it was entitled to withhold payment based on SKI's lack of progress. The government did agree to re-inspect the units to determine if SKI's percentage of completion had advanced (SR4, tab 65).

131. On 24 September 1985, SKI removed material from the work site to its warehouse (SR4, tab 98 report 19; tr. 11/216-17).

132. On 25-26 September 1985, the government inspectors re-inspected the units on Palm Circle and Oak for payment purposes. They determined the contract to be 5.49% complete as opposed to the 9% that SKI used to invoice on. Considering this, and the materials on site, SKI was

then paid \$72,013.17 on 27 September (R4, tab 95; SR4, tab 98 reports 220-21; tr. 13/183-84).

133. On 2 October 1985, SKI wrote the contracting officer, setting out its position on the categories of defects begin reported on the punchlists and alleging that it was being held to unreasonable standards in the inspections. SKI alleged that the government had breached the contract by non-payment and that further performance was impossible until the government directed SKI as to how to correct the defects (R4, tab 96).

134. On 3 October 1985, SKI invoiced the government for \$198,517.88 (R4, tab 97).

135. On 21 October 1985, the contract administrator requested the inspectors to list all the unacceptable

or incomplete work on the units that had not received a formal inspection. Most of the defects present in the Oak Drive units that had been previously inspected were also represent in the units that were now inspected (SR4, tab 99 report 11; tr. 11/155-56).

136. On 24 October 1985, the contracting officer responded to SKI's 2 October letter, denying any unreasonable inspections and pointing out that of the 48 units in SKI's possession, SKI had requested inspections on only 15 units and none had been accepted (R4, tab 98).

137. On 30 October 1985, SKI removed its backhoe, which was used to dig the foundations for the patios, from the project (SR4, tab 99 report 19; tr. 11/216-17).

138. On 31 October 1985, SKI was notified that the contract had referred

to TCO for consideration of default. SKI was directed to present any facts it had as to why the contract should not be terminated for default to the TCO (R4, tab 100).

139. On 8 November 1985, SKI presented its position to the TCO. SKI stated that all 48 of the units in its possession were complete with the exception of a "few areas that were not made accessible". SKI alleged that it had requested inspections for these units that were ready but the inspection requests were ignored. SKI's position was that the contract was impossible of performance because the government would not tell it how to correct the alleged defects. SKI stated that it would correct any items of work, if the items can be corrected and are made known to them and that SKI had personnel available

to accomplish this. SKI did not provide the TCo with any documents supporting any of its statements (R4, tab 101).

140. Contrary to SKI's assertions to the TCo that all of the 48 units were virtually complete, on 5 of the 48 units, SKI had not even started interior work (tr 11/218).

141. On 26 November 1985, the government paid SKI \$63,071.74 on SKI's 3 October 1985 invoice, representing payment for materials (the windows that were delivered to the site). This was the last progress payment request received and the last payment made on the contract (exh. A-121; tr. 13/144-45).

142. In November 1985, the TCO asked the government project manager to list the deficiencies for the 14 units given pre-final inspections that SKI had been directed to correct and had not been

corrected. The inspectors, using the punchlists generated during the original inspections, re-inspected each of these units and determined that most of the discrepancies remained (SR4, tab 71; tr. 6/259-61, 8/298-302, 9/236-41, 10/117-19, 11/156-61, 13/239).

143. On 23 December 1985, by modification P0005, the TCO terminated the contract for default (R4, tab 102).

144. On 13 January 1986, the inspectors inventoried the materials at SKI's warehouse (SR4, tab 101 report 13).

145. By letters dated 14 October and 30 December 1986, SKI filed a certified claim for "additional costs due to delays during the periods 1 November 1984 thru 1 July 1985 and 7 August 1985 thru 30 December 1985," comprised in large part of unabsorbed overhead (exh. A-109-110).

146. On 20 March 1986, SKI filed a timely appeal of the TCO's decision terminating the contract for default (ASBCA No. 32637 (R4, tab 103)).

147. On 2 June 1987, the contracting officer denied SKI's delay claim, contending that the 388 days of delay that formed the basis of the claim were delays due to SKI's own actions (exh. B-1).

148. On 8 June 1987, SKI filed a timely appeal of the denial of its claim (ASBCA no. 35074).

DISCRETE PROBLEMS⁹

149. We set forth below facts related to what appear to be the major disputes of consequence between the parties regarding the work performed.

EXPANSION JOINT SEALER¹⁰

150. Section 03300 of the specifications provides:

10. JOINTS:

a. Expansion Joints. Expansion joints shall be provided at locations indicated. Continuous preformed expansion joint filler strips, 3/8 inch thick and the full depth of slab, shall be provided in expansion joints unless otherwise indicated or specified. Edges of concrete along joints where exposed to view shall be slightly rounded. At joints between exterior slabs and building walls, the preformed filler strips shall be kept 3/4 inch below the surface and the remaining space filled neatly with an approved joint sealer. Joints shall be clean and dry before sealing compound is put in place.

151. At 102 Palm, the government engineer told Mr. McDonald not to use a joint sealer because of the peculiar arrangement of that patio. Thereafter, SKI never installed any sealer on any patio joint in the entire contract (tr. 7/168-69, 12/16, 13/221-24).

152. The lack of sealant on patio joints requiring sealant was the subject of many of the deficiencies on the

various punchlists (tr. 9/49-51; R4, tabs 78, 82, 92).

153. Despite the fact that the specifications required SKI to submit a joint sealer of the government's approval, none was ever submitted (R4, tab 5; tr. 11/190-91, 13/97-98, 13/222-24).

SOFFITS AND CARPORT CEILINGS

154. Section 06220 of the specifications states:

6. INSTALLATION OF EXTERIOR FINISH WOODWORK

a. General. Erect exterior finish woodwork as shown. Fasten woodwork with galvanized finish or basing nails suitable for setting. Provide blind nailing as far as practicable. Set fact nails for putty stopping. All work shall be straight, level and free from sagging or warping.

* * *

c. Porch Ceiling and Eave Soffit Finish. Porch ceilings and eave soffits shall be

covered with 3/8 inch thick exterior grade A-C plywood. Solid bearing shall be provided at joints, ends and edges of plywood. Plywood shall be secured with galvanized 6-penny casing nails, spaced 10 inches apart along intermediate supports and 5 inches apart along all edges. A bed mold shall be installed at walls and beams adjoining porch ceilings and soffits. Openings shall be provided in soffits for installation of prefabricated metal soffit vents specified in Section 05010, "Miscellaneous Metal Work".

(R4, tab 5).

155. During the inspection of 102 Palm on 12 August 1985, the government noticed that some of the soffits were loose and sagging. The government attributed this to improper nailing.
(tr. 11/77).

156. On many occasions, and in front of many witnesses, Government personnel were able to place their hands on plywood ceilings and soffits installed by SKI and

push the boards upward, making the edges of the joints even, demonstrating that they were loose and sagging. Warped, loose and sagging soffits and facia appeared on the punchlist for many of the units.

SKI contends that the warped, loose and sagging soffits and ceilings did not exist but if they did, they were caused by curved and bowing existing structures. Appellant's expert opined this theory but testified that he did not observe the condition (of this existing structures) in examining the buildings under SKI's contract.¹¹ The Board was not provided with any credible evidence that this was the cause of the problem (tr. 6/148-49, 7/85-86, 10/116, 11/81-81, R4, tabs 74, 78, 92; SR4, tab 120).

SHINGLE ROOFING

157. Section 07311 of the specifications states:

6. APPLICATION OF STRIP-SHINGLE ROOFING;

. . . Starter strips shall project a full 1/2" beyond the metal drip edge . . . the first course of shingles shall be laid directly on top of the starter strip, flush with the outer edge and shall be aligned vertically and horizontally . . . Upon completion, any roofing showing cement or other soiling on exposed surfaces shall be removed and replaced with new roofing.

(R4, tab 5)

158. During the inspection of 102 Palm, the government noted that the 1/2" requirement for projection from the metal drip edge had not been met and that the roofing shingles on the gable end of the roof had been chopped off giving a ragged appearance. These defects appeared on the punchlists for a number of units.

(tr. 11/67-68; R4, tabs 74, 78, 82).

DRIP EDGE

159. Section 07600 of the
specifications states:

5. INSTALLATION

f. Metal Drip Edges. New metal drip edges formed of 26 gage galvanized iron or steel shall be provided at all edges of new strip-shingle roofing. Joints shall be lapped not less than 2" and filled with roofing cement. The inner flanges shall be extended onto the roof not less than 2" and shall be nailed 3" on center through the roofing flat. Nails shall then be covered with plastic asphalt cement. The outer flange shall be turned down over the edge of the roof to form as shown on the drawings.

(R4, tab 5).

160. During the inspection of 102 Palm, the government noted that the lap joints required on the edge metal were not 2", or in some cases did not exist at all. These defects were noted on the punchlists for many of the units as well as a "kickout" feature. A "kickout" is when the bottom vertical side of the edge metal that descends parallel to the

facia, sticks out and is not close to the facia (tr. 11/64-65; R4, tabs 74, 78, 82, 92; SR4, tab 120).

161. SKI contends that the fabrication of the drip edge in accordance with government specifications that have been adjoining strip overlapping each other, necessarily causes a "kickout" (i.e., an area where the edge sticks out from the facia). SKI contends that it was impossible to correct this problem without a redesign of the edge metal. The reprocurement contractor corrected the "kick-out" problem by renailing or crimping the metal edge joints (tr. 3/113, 10/113-15).¹²

DOORS

162. Section 08200 of the specifications states:

3. GENERAL REQUIREMENTS:

a. General Marking and Grading.
Grade mark each door by stamp, brand or label of design and wording as required by the applicable NWMA Standard or FHDA Standard. Millwork for door frames shall be graded in accordance with the rules of the association governing species used. Use only recognized marks.

4. EXTERIOR DOORS:

a. General. Exterior doors shall conform to applicable requirements of NMWA Standard I.S. 1 or I.S. 5, or FHDA/7-79, and shall be toxic preservative treated.

163. Section 05010-2 of the specifications states:

8. Door Louvers: Door louvers shall be factory-fabricated extruded anodized aluminum of size and indicated on the drawings . . . A continuous bead of butyl rubber and elastomeric type sealing compound shall be applied between door and exterior flanges of door louvers to seal the joint watertight.

(R4, tab 5).

164. On 16 January 1985, SKI submitted its material submittal (no. 44) for the wood doors. SKI did not supply any certification that the doors met the

standards in the specifications. The doors did not have any stamp on them indicating that they met the requirements of the specifications (exh. A-27; tr. 9/23-25; R4, tabs 78, 82, 92).

165. Throughout the contract, the Government constantly notified SKI that the wooden doors installed by SKI were "photographing." Photographing is a term common to the industry to describe a door when the outline of the blocks that make up the core of the door (under the veneer) are visible after the door has been painted. The Government felt that if the doors were built to the standards of the specifications that they should not be photographing. Since the Government had not received a door certification, nor did the doors have a stamp on them indicating that they met the standards referenced by the

